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MAKING PRISONS PRIVATE: AN IMPROPER DELEGATION OF A GOVERNMENTAL POWER

INTRODUCTION

The Reagan administration's efforts to privatize various areas of government involvement is part of a movement to decrease its role in American society. The administration's pro-business policies have spurred plans toward privatization in such diverse areas as postal service, transportation and certain non-combat sectors of the military. In addition, privatization has reached into the corrections area, where "prisons for profit" have become more common in the past few years.

While the private sector has been involved in the corrections area in the past, and in some states prisons and jails contract out for such things as food and medical services, the privatization currently emerging goes beyond any previous steps in that direction. This Note addresses this new form of privatization, which concerns the total control, administration and operation of places of incarceration by persons in the private sector. While proponents of privatization ar-

2. See A. Stewart, Privatization: A Selective Bibliography 1 (Public Administration Series: Bibliography, May 1986). (In keeping with President Reagan's philosophy of reducing 'big government,' privatization is being pushed from Washington.); Mahaffey, Privatization vs. the Constitutional Commitment to the Promotion of the General Welfare, 1983 Det. C.L. Rev. 1339, 1340 ("The Reagan administration has . . . focused not on social issues and individuals but on corporate America with the promise to get government 'off the backs' of industry.").
4. Id.
5. A sampling of privately operated correctional institutions include a 350-bed center in Houston, Texas for illegal aliens, a federal prison for juveniles near Santa Cruz, California, a medium security facility for women in Rosedale, Minnesota, and a 300-bed adult jail in Chattanooga, Tennessee. All told, "[m]ore than a dozen privately operated adult correctional institutions now exist [with] numerous juvenile facilities and U.S. Immigration and Naturalization Service detention centers" adding greatly to this number. Greengard, Making Crime Pay, 13 Barrister 12 (Winter 1986).
6. See infra notes 18-21 and accompanying text.
7. See infra note 24 and accompanying text.
8. Dept's. of Commerce, Justice, and State, the Judiciary, and Related Agencies Ap-
gue that the private sector can alleviate the problem of overcrowded prisons and jails more cheaply and efficiently than the government, such arguments do not address important problems concerning the legality of private prisons.

This Note focuses on one problem area generated by this sort of privatization — the constitutionality of delegating the function of corrections to the private sector. At the heart of the nondelegation doctrine is a concern for political accountability. By invalidating a sufficiently broad delegation of legislative power to another branch


Private prisons can be built and financed through several methods. While privatization may take place in the form of a company taking over an existing facility from the hands of its public operator, a popular method seems to be a total package of private financing, construction and leasing of a correctional facility.

Traditionally, governments have financed the construction of new jails and prisons with tax revenues and through money borrowed on general obligations bonds (known as the "pay-as-you-go approach"). The problem with the "pay-as-you-go approach" is that construction costs often exceed the liquid cash reserves. Additionally, although general obligation bonds are seen as a low risk for investors since they are backed by the government, they are subject to voter approval and debt limitations which often hamper plans for prison construction.

Mullen, Corrections and the Private Sector, 1985 Nat'l Inst. of Justice—Research in Brief, Mar. 1985, at 1, 2-3.

Because of the perceived need for more prisons to meet the growing number of criminal offenders and the difficulty in securing the finances needed for such institutions, governments are now ready to listen to private companies who claim they can do the job without the problems that the government faces. A popular method of private financing is called the lease-purchase agreement. Under this method, investors buy bonds called "certificates of participation." The facility is then built with this money and ownership is put in a private trust to the government until such time as the government's lease payments have fully paid for the institution. At that time, ownership will pass from the trust, such as a nonprofit corporation, to the government. See K. Krajick, Private Financing and Management of Prisons and Jails 4 (May 1984)(report sponsored by The Edna McConnell Clark Foundation); Rosenberg, Who Says Crime Doesn't Pay?, 35 Jericho 1, 4 (Spring 1984). For a detailed discussion of how lease-purchasing financing operates and the parties involved in such operations, see E.F. Hutton, Innovative Alternatives to Traditional Jail Financing (available through E.F. Hutton and Co., Inc.).


10. See infra notes 100-68 and accompanying text.

11. See infra notes 49-58 and accompanying text.

12. See infra notes 51-52 and accompanying text.
of government or private party, the doctrine requires that the legislature live up to its responsibilities and not delegate its power to politically unaccountable persons or parties.\textsuperscript{13}

No case law has yet addressed the constitutionality of delegating the provision of corrections to the private sector. Therefore, this Note applies the policies and reasoning of nondelegation cases in other contexts to argue that the nondelegation doctrine precludes the privatization of corrections.

Part I examines the history of prison privatization and the current debate. Part II discusses some of the leading nondelegation cases, including \textit{A.L.A. Schechter Poultry Corp. v. United States},\textsuperscript{14} \textit{Panama Refining Co. v. Ryan},\textsuperscript{16} and \textit{Eubank v. Richmond}\textsuperscript{16}. Part III applies the reasoning and concerns of these cases to the situation of private prisons. Finally, Part IV focuses on a few of the major policy reasons against privatization which arise regardless of whether the power is delegable as a matter of law.

\section*{I. Prison Privatization}

\subsection*{A. History}

Although private prisons have only recently emerged,\textsuperscript{17} the relationship between the private sector and correctional institutions has a long and often troubled history.

In the nineteenth and early twentieth centuries, it was common for prisons in this country to contract prisoners out to the private sector, which would then use the inmates as virtual slaves on plantations and in factories.\textsuperscript{18} Although this method worked well for the two contracting parties, the prisoners themselves suffered a great deal of abuse since neither the corrections officials nor the private contractors cared much about their welfare.\textsuperscript{19}

\begin{thebibliography}{10}
\bibitem{13} Id.
\bibitem{14} 295 U.S. 495 (1935).
\bibitem{15} 293 U.S. 388 (1935).
\bibitem{16} 226 U.S. 137 (1912).
\bibitem{17} \textit{See}, \textit{e.g.}, Taylor, \textit{Should Private Firms Build Prisons}, Washington Post, May 7, 1985, at A15, col. 1.
\bibitem{19} Krajick, \textit{Punishment for Profit, supra} note 18, at 12; Sexton, Farrow \& Auerbach,
This method remained popular until reform came in the twentieth century. Ironically, the impetus for change did not come from a concern for the prisoner's welfare, but from labor unions that saw slave labor as a threat to union jobs. Their growing strength enabled labor organizations to secure legislation which limited the role of prison labor in the economy. By 1980, however, change had taken place again. In response to the new philosophy of rehabilitation through work and vocational skills, while using profits from "prison industries" to defray the cost of incarceration, private sector involvement began again on a regulated basis.

Other areas exist where correction institutions and private industries have formed business relationships. Specialized prison services such as food, medicine, and education are increasingly being supplied by private companies. Indeed, within roughly the past fifteen years, the private sector has operated pre-release facilities, halfway houses, aftercare centers, and juvenile facilities.

In the past few years, private companies have begun operating entire prisons on a for-profit basis. Such prison privatization has much more serious implications than a prison contracting out for food service or privately operated pre-release centers. The implications of privatization in this area go beyond correctional policy and

supra note 18, at 2.

\[\text{20. Sexton, Farrow & Auerbach, supra note 18, at 2; A. Aiyetoro, supra note 8, at 2.}\]

\[\text{21. Id. See also V. Fox, Correctional Institutions 86-7 (1983).}\]

\[\text{22. The former Chief Justice of the United States, Warren E. Burger, believed that correctional institutions should be "factories with fences" rather than "warehouses with walls." This was seen as a way of reducing operating costs, providing greater efficiency, and teaching job skills to prisoners. Sexton, Farrow & Auerbach, supra note 18, at 1.}\]


However, some states still prohibit private involvement. See, e.g., Mich. Comp. Laws Ann. § 800.326 (West 1982) ("The labor of inmates shall not be sold, hired, leased, loaned, contracted for, or otherwise used for private or corporate profit or for any purpose other than the construction, maintenance, or operation of public works, ways, or property as directed by the governor.").

\[\text{24. Greengard, supra note 5, at 15; Mullen, supra note 8, at 1-2; A. Aiyetoro, supra note 8, at 2.}\]

\[\text{25. Mullen, supra note 8, at 1; Woolley, Prisons for Profit: Policy Considerations for Government Officials, 90 Dick. L. Rev. 307 (1986); A. Aiyetoro, supra note 8, at 2.}\]

\[\text{26. Woolley, supra note 25, at 308-09.}\]
concern the role of government in our society.  

B. The Private Prison Debate

Proponents of privatization argue that the government has not adequately operated its jails and prisons. Prisons remain overcrowded and costly. Presently, America's correctional institutions are operating at 110% of capacity, with conditions in some states being so bad that they are under court order to alleviate overcrowding. Even more alarming is the likeliness that the situation will continue to deteriorate, as a result of the rate by which prison populations continue to expand. For example, the prison population has more than doubled in the past fifteen years, and in a period of only six months, from December 31, 1984 to June 30, 1985, the prison population increased 5.6%. This has created a dilemma for government officials: they must either solve the overcrowding problem and the unsatisfactory conditions which accompany it, or they will be forced to release prisoners early. Additionally, it will cost the gov-

27. See infra notes 170-81 and accompanying text.
31. "[P]risons in Maryland are housing twice as many prisoners as they were designed to hold while the District of Columbia Jail is presently holding 1,000 more prisoners than it was designed to house, despite the fact that it was constructed to solve overcrowding in the old jail." A. Aiyetoro, supra note 8, at 3 (footnote omitted). As of June 1985, the prison and jail population in Luzerne County, Pennsylvania reached 210% of its capacity. PENNSYLVANIA LEGIS. BUDGET AND FINANCE COMM., REPORT ON A STUDY OF ISSUES RELATED TO THE POTENTIAL OPERATION OF PRIVATE PRISONS IN PENNSYLVANIA, at 18 (Oct. 1985) [hereinafter Report on a Study of Issues]. The experience in New York is typical; there were 34,754 inmates in state prisons as of March 28, 1985 — almost three times as many as on January 1, 1972. Determinate Sentencing Report, supra note 30, at 15. By mid-1987, the state's prison population is expected to reach 40,000. Johnson, Prison Report: State Takes a Look at Correction Policy, N.Y. Times, Dec. 13, 1986 at 29, col. 1. Overcrowding on the federal level is just as serious; the federal prison system, with a capacity of 28,000 prisoners, now has 44,000. Kerr, U.S. Drug 'Crusade' Is Seen as Undermining Itself, N.Y. Times, Oct. 26, 1987, at B6, col. 3.
32. A. Aiyetoro, supra note 8, at 3. The total number of people incarcerated in federal, state and local prisons and jails each year is approximately 700,000 inmates. Greengard, supra note 5, at 12.
33. Adkins, If the Taxpayers Won't Build New Prisons, Business Will Fill the Gap, DUN'S BUSINESS MONTH, June 1984, at 66, col. 1; Timberlake, Finance Subcommittee Considers Prison Construction Privatization Act, TAX NOTES, Sept. 24, 1984, at 1220. This dilemma is, of course, contingent on the continued practice of sending increasing numbers of persons to
ment an estimated ten billion dollars a year, or about eighteen million dollars a day for the housing, care, and supervision of these prisoners.

Private prison companies believe that they can alleviate the overcrowding problem by building more prisons. Proponents argue that, while governments spend at least $100,000 for the construction of one maximum security cell, a private company can build a comparable cell for ten to twenty percent less. In addition, proponents claim they can build the facility much faster. While traditional construction of a correctional facility may take more than seven to eight years, it is claimed that the private sector can build a prison in one year.

Closer examination reveals that some of the claims made by proponents of privatization, particularly in the area of cost, may not be accurate and have been proven wrong on at least two occasions. In 1984, Hamilton County, Tennessee, turned over its jail to a private company in an effort to save money. Due to unanticipated costs, the county wound up spending $200,000 more than it expected under its contract. In 1982, when a private company took over the prison and the liability imposed on prisons for violation of inmate's eighth amendment rights. See, e.g., Lareau v. Manson, 651 F.2d 97, 108-09 (2d Cir. 1981)(more than thirty days of double bunking constitutes a violation of the cruel and unusual clause of the eighth amendment).


36. Determinate Sentencing Report, supra note 30, at 17. "In addition to the cost of capital construction, operating expenses are estimated at approximately $17,000 a year per inmate. When the indirect costs of incarceration are added, such as mental health services, prisoners' legal services and employee pensions and fringe benefits, operating costs rise to approximately $25,000 per inmate." Id.


38. Breaking Up Government's Monopoly on Prison Cells, N.Y. Times, Mar. 3, 1985, § 4, at 22E, col. 1. Private companies do not have to pay the high pension and retirement benefits of public employees nor are they hindered by the public bidding process which often delays plans for construction. Id. Tom Beasley who heads Corrections Corporation of America (CCA), the largest of the private prison companies, states, "We can be competitive in terms of pay and training, and we can offer efficient management of resources." Quade, Jail Business, 69 A.B.A. J. 1611, 1612 (Nov. 1983). See also Borna, supra note 18, at 328 (proponents argue that private prisons will have better motivation, management and flexibility).

Okeechobee Reform School in Florida, the company believed it could do a better job for less money. The company quickly discovered that in order to live up to its contract, it would have to expend more money than the state had spent, not less.\(^4\)

Proponents also ignore the fact that there are "hidden costs" inherent in the operation of a private prison that, when taken together with recognized expenses, greatly increase the cost.\(^1\) Such "hidden costs" include contract monitoring\(^2\) and legal fees\(^3\) from inmate suits.

The private operation of prisons is too recent a development to test whether claims made by proponents of privatization are true. One study has concluded that "[t]he private prison experience is so new, varied and limited . . . that a definite conclusion as to comparative public prison and private prison costs could not be made."\(^4\)

While the claims made by private prisons are suspect, privatization also raises at least two important legal issues: "state action"\(^5\) and delegation problems.\(^6\) Although the operation of a private prison would probably be considered as state action,\(^7\) the more difficult

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\(^{40}\) Huntley, Reform School Much Improved, But it's Too Soon To Tell Whether it Can Turn Boys Away From Crime, St. Petersburg Times, March 26, 1984, at B1, col. 1.

\(^{41}\) 17 CRIM. JUST. NEWSL., Jan. 2, 1986, at 3.

\(^{42}\) "Even though a service or facility is contracted out, governmental units still bear the cost of contract administration including the preparation of the contract and monitoring the contractor's performance." Letter from Mark L. Gray to Ed Koren (Nov. 19, 1984) (discussing American Federation of State, County and Municipal Employees (AFSCME's) negative position on the privatization of correctional facilities) (on file at Hofstra Law Review). See Hearings, supra note 8, at 481-82; Report on a Study of Issues, supra note 31, at 29; Mullen, supra note 8, at 7.

\(^{43}\) Pennsylvania Corrections Commissioner Glen Richard Jeffes doubts that privatization would save the state money and stated, "[a]ny state that moves in this direction is going to have to double its legal staff, to handle all the lawsuits." 17 CRIM. JUST. NEWSL., Jan. 2, 1986 at 3; Report on a Study of Issues, supra note 31, at 29.

\(^{44}\) Report on a Study of Issues, supra note 31, at 34. At least one commentator has argued that privatization may even be more expensive. See Rosenberg, supra note 8, at 4. At the very least, the purported benefits remain unclear. See Hearings, supra note 8, at 471; Borna, supra note 18, at 330; A. Aiyetoro, supra note 8, at 6.

\(^{45}\) State action is "[w]hen a private party, as compared with a government employee, is charged with abridging rights guaranteed by the Constitution or laws of the United States, the plaintiff, in order to prevail under 42 U.S.C. § 1983, must show that the private party was acting 'under color of state law.'" Robbins, supra note 28, at 327. See Polk County v. Dodson, 454 U.S. 312, 317-18 (1981); Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

\(^{46}\) Greengard, supra note 5, at 15. For a brief discussion of the delegation problem, see Robbins, No Quick Fixes, 73 A.B.A. J. 38 (Apr. 1987).

question is whether the provision of corrections can be delegated to a private party, or would be prohibited by the nondelegation doctrine.

II. THE NONDELEGATION DOCTRINE

A. The Doctrine Generally

Article I of the Constitution states that "[a]ll legislative Powers . . . shall be vested in a Congress . . . ." Under a strictly literal reading, the legislative power is given to Congress, and cannot be delegated to other branches of government or to private parties, under the rationale that the legislature must remain accountable to the electorate by being responsible for all rule-making. Unlimited delegation would circumvent such accountability and result in an undemocratic imposition of rules on the public.

While the nondelegation doctrine was applied in the early twentieth century, the use of the doctrine has diminished in recent times. Today, because of the demands of today's highly complex society, which prevent the legislative branch from formulating the myriad of technical rules by which society operates, courts are reluctant to strike down legislation as being an unconstitutional delegation of power. Therefore, as a matter of necessity, some lawmaking power must be delegated to bodies, such as administrative agencies, which have the expertise and resources to set up appropriate rules in

48. U.S. CONST. art. I, § 1. States have similar provisions in their constitutions. See, e.g., CAL. CONST. art. IV, § 1; FLA. CONST. art. III, § 1; ILL. CONST. art. IV, § 1; N.M. CONST. art. IV, § 1; N.Y. CONST. art. III, § 1; PA. CONST. art. II, § 1; TENN. CONST. art. II, § 3; TEX. CONST. art. III, § 1.


51. Id.

52. In the 1930's, the nondelegation doctrine was a powerful constitutional tool used to strike down the federal regulatory statutes enacted during the Depression. Today, the doctrine is applied in the states primarily with regard to issues relating to zoning and privately established professional and industrial standards. See Liebmann, Delegation to Private Parties in American Constitutional Law, 50 IND. L.J. 650, 651 (1975). However, the doctrine may have found a resurgence in recent case law. See INS v. Chadha, 462 U.S. 919 (1983); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980); National Cable Television Ass'n v. United States, 415 U.S. 336 (1974).

53. See Johnson, State Regulation of Long-Term Care: A Decade of Experience With Intermediate Sanctions, 13 LAW, MED. & HEALTH CARE 173 (Sept. 1985); Robbins, supra note 28, at 329-30; Schoenbrod, supra note 50, at 1224. For an argument in favor of private participation in the legislative process, see Jaffe, Law Making by Private Groups, 51 HARV. L. REV. 201 (1937).
a specific area.

For a delegation of power to be held constitutional, at the very least, a clear policy decision must first be made by the legislature, and proper safeguards must accompany the delegation to prevent any potential abuse.\textsuperscript{44} While this is the general thrust behind the doctrine, the case law in this area is unclear in its efforts to transform this theory into a set of concrete principles. Over the years, the Supreme Court has taken different approaches in deciding delegation cases. Standards range from the “fill up the details” test,\textsuperscript{5} to the vague “reasonably practicable” test.\textsuperscript{6} Commentators have criticized the Court’s inconsistency in this area and have complained that its rationale is often unsatisfactory.\textsuperscript{67}

\textbf{B. The History of the Case Law}

Although the Court has failed to set forth a consistent and articulate standard for the nondelegation doctrine, nevertheless, it made use of the doctrine in two important cases during the Depression era: \textit{A.L.A. Schechter Poultry Corp. v. United States}\textsuperscript{58} and \textit{Panama Refining Co. v. Ryan}.\textsuperscript{59} Other important cases followed\textsuperscript{60} and although some have argued that the nondelegation doctrine is dead,\textsuperscript{61} an argument can be made that it may be revitalized.\textsuperscript{62} Few would deny that the nondelegation doctrine should be invoked in a situation involving a broad delegation of traditional government power which lacks satisfactory protections.

The Court first invalidated a congressional delegation to another authority in \textit{Panama Refining Co. v. Ryan}.\textsuperscript{63} In \textit{Panama}, the Court

\begin{thebibliography}{99}
\bibitem{55} Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)(once a general provision has been made by the legislature, those given power to act under the provision may fill in the missing details).
\bibitem{56} Buttefield v. Stranahan, 192 U.S. 470, 496 (1904)(due to the necessities of the circumstances, Congress had to leave executive officials the duty to bring about the result intended by the statute).
\bibitem{58} 295 U.S. 495 (1935).
\bibitem{59} 293 U.S. 388 (1935).
\bibitem{60} See infra notes 90-98 and accompanying text.
\bibitem{62} Schoenbrad, supra note 50, at 1236; Note, supra note 57, at 632.
\bibitem{63} 293 U.S. 388 (1935).
\end{thebibliography}
held that Section 9(C) of the National Industrial Recovery Act of 1933,64 which gave the President the authority to prohibit shipment of illegal or "hot" oil through interstate commerce,65 was an unconstitutional delegation of power to the President.66

The Court first determined that the prohibition by law of the transportation of such oil was a question of legislative policy.67 The Court then examined the statute to determine if Congress had declared such a policy and had supplied the President with sufficient guidelines.68 The Court found that Congress had not declared such a policy, either in Section 9(C) or anywhere else in the Act,69 and furthermore, that nothing in Section 9 acted as a limitation on the President's broad discretion under Section 9(C).70 The Court stated that "the Congress has declared no policy, has established no standard, has laid down no rule."71

In the second nondelegation case of the Depression era, A.L.A. Schechter Poultry Corp. v. United States,72 the Court once again struck down a provision of the National Industrial Recovery Act.73 In Schechter, Section 3 of the Act was held to be an impermissible delegation since it allowed the President to approve detailed codes of fair competition that were laid down by the poultry industry. The Court acknowledged that "[e]xtraordinary conditions [of the Depression] may call for extraordinary remedies,"74 but insisted that the action must still be constitutional.

In Schechter, the Court again took a close look at the statute to see if it had met the necessary elements of a constitutionally permissible delegation. The Court found that the term "fair competition" was not defined in the Act, and that unlike the term "unfair competition," which had a specific and narrow definition under the common law, "fair competition" does not have a legal definition that can be imputed in the absence of a specific definition in the statute.75

65. Id. at 406.
66. 293 U.S. at 433.
67. Id. at 415.
68. Id. at 415-16.
69. Id.
70. Id. at 416.
71. Id. at 430.
73. Id. at 542.
74. Id. at 528.
75. Id. at 531-534.
The Court then examined the Act's "Declaration of Policy" and found that its purpose was to give the President "virtually unfettered" discretion. Such broad discretion forced the Court to strike down the Act as "an unconstitutional delegation of legislative power." 77

Other cases have upheld the nondelegation doctrine in various areas of the law. In Eubank v. City of Richmond, 78 the Court invalidated an ordinance which delegated power to property owners to establish building lines (for zoning purposes) based on a request by two-thirds of the owners on a given street. 79 The Court held that the ordinance was an unreasonable exercise of the police power, and thus did not have to reach the nondelegation issue. 80 Still, the Court voiced some concerns of the nondelegation doctrine. For instance, no standards accompanied the grant of power to private parties, and the property owners were given power solely for their own interests, which could be exercised arbitrarily and capriciously. 81

Following Eubank, the Court struck down a similar zoning provision in Washington ex rel. Seattle Title Trust Co. v. Roberge. 82 In Washington, two-thirds of the property owners were given the power to deny, without reason, the construction of a building. 83 The Court found that the delegation of power, free from review or control by a standard prescribed by legislative action, resulted in the ability to withhold consent based on arbitrary reasons and, therefore, was an unconstitutional delegation repugnant to the due process clause of the fourteenth amendment. 84

The Court did not decide any major nondelegation cases until forty-five years after Schechter; however, two recent cases suggest that new life may have been breathed into the nondelegation doctrine. In Industrial Union Department v. American Petroleum Institute, 85 the Court invalidated a delegation to the Secretary of Labor which permitted him to fix an exposure limit on airborne benzene

76. Id. at 542. Even Justice Cardozo, who dissented in Schechter, labeled this case a "delegation running riot". Id. at 553 (Cardozo, J., concurring).
77. Id. at 542.
78. 226 U.S. 137 (1912).
79. Id.
80. Id. at 144.
81. Id. at 143-44.
82. 278 U.S. 116 (1928).
83. Id. at 118.
84. Id. at 121-22.
85. 448 U.S. 607 (1980).
under the Occupational Safety and Health Act. The Court stated that before the Secretary could issue a standard, he would first have to make a finding that it was "reasonably necessary" under the statute to fix such an exposure limit, something which he failed to do.

Justice Rehnquist's concurring opinion took a different approach and argued that the nondelegation doctrine should strike down the Act altogether. Rehnquist found that Congress had failed to make a difficult, although clear, policy decision and had passed this decision on to the Secretary. Rehnquist concluded: "It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people."

In *Immigration and Naturalization Service v. Chadha*, the Supreme Court held unconstitutional a section of the Immigration and Nationality Act which allowed a legislative veto without a vote of both houses of Congress. The Court found that the Framers clearly intended that legislative decisions had to be made in accordance with the standards set forth in Article I — the bicameral and presentment to the President requirements. The ability to delegate legislative action by a shortcut in the political system is, as the Court put it, "an appealing compromise," but the court concluded that the Framers ranked other values higher than efficiency.

A few of the major concerns of the nondelegation doctrine are evident in the preceding cases. *Eubank* and *Washington* were concerned with the potential for abuse due to private motives. In *Panama* and *Schechter*, the statute which conferred the delegation was found to lack adequate standards. Finally, *American Petroleum* and *Chadha* were based on the notion of political accountability.

### III. Application of Nondelegation Principles to Private Prisons

Since the nondelegation doctrine applies to grants of legislative power, the first issue to consider is how that power concerns the operation of a prison. The running of a prison is an administrative

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86. Id.
87. Id. at 639-40.
88. Id. at 685-86 (Rehnquist, J., concurring).
89. Id. at 685.
90. Id. at 687.
92. Id.
93. Id. at 955-58.
94. Id. at 958-59.
function which combines elements of all three branches of government. Not only do prison custodians issue rules and regulations, but they are vested with the power to try and punish any prisoner accused of disobedience. For example, corrections officers in a prison serve in a quasi-judicial role: not only do they judge when infractions have occurred, but they are also responsible for imposing punishment and advising parole boards. In this respect, corrections officers can have an effect on the length of time an inmate will serve. Although prisons are often highly regulated, these regulations are derived more from the prison environment than from the legislature. The legislature's rules provide only a skeletal outline of what goes on inside the prison, the day to day rules regarding prison life are left to the correctional authorities. The very nature of prisons suggest that they "cannot be run by procedures carefully detailed by 'outsiders.' " Additionally, courts have long granted substantial deference to the discretion of prison administrators in making and enforcing rules for the institution.

Because prison administrators are vested with legislative power, one must consider how a delegation to a private prison company differs from a delegation to a publicly operated one. That a delegation to the former may be unconstitutional is suggested by the themes of the nondelegation cases discussed earlier. A closer examination of three of these themes — private motives, lack of clear standards, and

98. Such regulations include appearance of the inmates, visiting privileges, recreation time and work assignments. See J. RAGEN & C. FINSTON, INSIDE THE WORLD'S TOUGHEST PRISON 42-101 (1962).
the failure of the legislature to make a policy decision — will clarify the difference between public and private prisons.

A. Private Motives

The Eubank\textsuperscript{103} and Washington\textsuperscript{104} cases indicate the Court is more likely find an invalid delegation where the delegatee has private interests or motives at stake.\textsuperscript{105} Indeed, even where the delegation may be for the public's welfare,\textsuperscript{106} the Court may invalidate it because of the danger of private interests influencing decisions.\textsuperscript{107}

Private interests are in the forefront of prison privatization mainly because of the profit motive.\textsuperscript{108} A member of one prison-for-profit company voiced the general philosophy shared by proponents of prison privatization when he said, "I'll try anything if it works and makes a profit."\textsuperscript{109} Prison privatization, unlike the traditional corrections system, is a business, and, as such, its success depends on maximization of profits and minimization of costs and losses. Additionally, unlike the conventional prison, the private prison is backed by investment brokers, such as E.F. Hutton and Merrill Lynch,\textsuperscript{110} who seek to produce gains for their investors.

The presence of a profit motive results in private prisons substituting the goal of the general welfare of society with the goal of profit maximization.\textsuperscript{111} In this manner, cost considerations may ham-

\textsuperscript{103} 226 U.S. 137 (1912).
\textsuperscript{104} 278 U.S. 116 (1928).
\textsuperscript{105} Lanham, \textit{supra} note 49, at 61; \textit{see supra} notes 78-84 and accompanying text.
\textsuperscript{106} B. MEZINES, J. STEIN \& J. GRUFF, \textit{I ADMINISTRATIVE LAW} § 3.03[3], at 89 (1986).
\textsuperscript{107} In Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Court found an invalid delegation in allowing two-thirds of the coal producers to set maximum hours. \textit{Id.} at 310-11. Justice Sutherland, writing for the majority, stated:

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. \textit{Id.} at 311.

\textsuperscript{108} \textit{See}, e.g., Woolley, \textit{supra} note 25, at 310 ("Commercial operator of prisons risks sacrifice of inmates' constitutional rights to the primary commercial goal: profit.") Additionally, there is a conflict of interest problem. For example, under N.Y. Correct. Law § 22 (McKinney 1986), it is a misdemeanor for any officer or employee of the corrections department to have a direct or indirect interest in a contract for a correctional institution.

\textsuperscript{109} A. Aiyetoro, \textit{supra} note 8, at 9.

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{Breaking Up Government's Monopoly on Prison Cells}, N.Y. Times, Mar. 3, 1985, § 4, at 22E, col. 1. Additionally, some argue that public servants, not faced with the need to make profits, possess a more sincere desire to serve and care for those they are responsible for.
per, if not totally override, society's interest in correctional policy.

For example, because expenditures must be kept to a minimum in order for profits to remain high, a logical approach for the private prison to reduce its costs would be for it to decrease its staff (including guards), since this comprises the largest part of its budget.\footnote{1} Such a move, although it might make sense economically, does not make sense practically; to decrease the number of guards and staff at a facility only increases the danger to guards and inmates alike.\footnote{13} Critics also fear that the caliber of employees hired by private prisons will be substantially lower than their counterparts in the public sector.\footnote{14} Private prison companies would be free to hire non-union workers at less money than the wages paid to union staff,\footnote{116} and since they would not be required to give civil service tests, the quality of the staff may be compromised. Additionally, other areas of prison life, such as educational programs and food services, will likely suffer because of the new emphasis on cost considerations.\footnote{116}

Critics who fear that profit considerations will be detrimental to the inmates or the corrections system generally\footnote{117} can draw from experiences in other closely related areas to buttress their claims. Perhaps the closest analogy that can be drawn to prison privatization is

\begin{itemize}
\item Greengard, supra note 5, at 46; National Sheriffs' Association Opposes Privatization of Jails, Detention Facilities, CORRECTIONS DIGEST, Apr. 10, 1985 at 3 [hereinafter National Sheriffs']; Hearings, supra note 8, at 477-78.
\item See Taylor, supra note 17, at A15, col. 1; Letter from Mark L. Gray to Ed Koren (Nov. 19, 1984) (discussing potential problems with high staff-to-inmate ratios in private facilities)(on file at Hofstra Law Review); Letter to the author from Thomas A. Coughlin III, Commissioner of Corrections (Nov. 14, 1986)[hereinafter Coughlin](noting that New York's staff-to-inmate ratio of 1:3, based on security concerns, is not likely to be followed by private facilities)(on file at Hofstra Law Review).
\item Id. See also Duffy, Breaking Into Jail: The Private Sector Starts to Build and Run Prisons, BARRON'S, May 21, 1984, at 20 (noting that some equate privatization of prisons with union-busting); Krajick, Prisons for Profit, supra note 18, at 11 (noting that private institutions, unlike the government, can pay less to their employees by hiring non-union workers).
\item Foltz, supra note 30, at 80.
\item Hearings, supra note 8, at 460; Report on a Study of Issues, supra note 31, at 30; Krajick, Prisons for Profit, supra note 18, at 14; Mullen, supra note 8, at 1; Robbins, supra note 28, at 326; Rosenberg, supra note 8, at 4; Woolley, supra note 25, at 310, 330; Taylor, supra note 17, at A15, col. 1; Breaking Up Government's Monopoly on Prison Cells, N.Y. Times, Mar. 3, 1985, § 4, at 22E, col. 1.
\end{itemize}
the more prevalent and studied area of private security. Private security grew at a rapid pace in this country during the 1970s, largely as a result of the public's fear of crime, and the existing police agencies' lack of resources. Soon the number of persons employed by private security companies exceeded those in public law enforcement agencies.

While private security is widespread in this country, a study done for the National Institute of Justice found that many serious problems exist in this area. The study found that not only is the typical private security guard poorly educated and paid, but private guards suffer a higher turnover rate, and receive less training than their counterparts in public law enforcement.

While other areas of privatization, such as health care for the poor, have proven to be less successful than anticipated, prison privatization is still untested. The limited data that has been produced, however, indicates that the profit motive may have already affected the operation of some private prisons. Already, some private institutions, because of their lower pay, have reported a high employee turnover rate, while others have had to require employees to work sixteen-hour days. In one case, unheeded complaints about the quality of food in a prison led to an inmate disturbance and destruction of property. Finally, in Medina v. O'Neill, a prisoner was accidentally killed by an employee of a private security facility when he tried to escape from what the court later found to be unconstitutional conditions of confinement.

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121. Id. at 133.
122. Id. at 146-47.
123. Id. at 171.
125. Greengard, supra note 5, at 16.
126. Huntley, Reform School Much Improved, But it's Too Soon to Tell Whether it Can Turn Boys Away From Crime, St. Petersburg Times, Mar. 26, 1984, at B1, B6, col. 1.
127. Harrison & Gosse, supra note 111, at 188.
129. Id. at 1041.
B. Lack of Clear Standards

As evident in both the Schechter\textsuperscript{130} and Panama\textsuperscript{131} decisions, one of the fundamental requirements of a valid delegation is that the enabling statute be clear in both its scope and definitions. The statute should confer only power that was intended to be conferred; the best way to insure this is to promulgate a statute that is clear on its face and sets forth the specific powers that are being delegated.

Presently, only four states have passed prison privatization enabling statutes,\textsuperscript{132} but all four statutes have some problems. The Texas statute\textsuperscript{133} allows a county to contract with a private organization for the placement of low-risk inmates.\textsuperscript{134} Although it is clear that this sort of privatization is intended for minor offenders who require limited supervision,\textsuperscript{135} nevertheless, the three sentence statute imposes no standards or definitions regarding what it encompasses, nor does it mandate that the private institution meet the requirements of a comparable public institution under the title.

New Mexico has passed a much more comprehensive statute\textsuperscript{136} allowing for the private operation of county jails on a trial basis.\textsuperscript{137} Although it has provided for such things as the legal status of a private correctional officer\textsuperscript{138} and limited the ability of an independent contractor to affect an inmate’s “good time” deductions,\textsuperscript{139} the statute is quite vague in a few areas. For example, the statute does not explain what constitutes “clean and healthy” conditions of confinement, nor does it refer to any set standards.\textsuperscript{140} The statute also allows the private contractor to decide whether the food it serves is of “a good and wholesome quality and sufficient in quantity for the

\begin{itemize}
\item 295 U.S. 495 (1935).
\item 293 U.S. 388 (1935).
\item These states are Florida, New Mexico, Tennessee and Texas.
\item TEX. REV. CIV. STAT. ANN. art. 5115d (Vernon 1987).
\item TEX. REV. CIV. STAT. ANN. art. 5115d(a) (Vernon 1987).
\item “The commissioners court of a county ... may contract with a private organization for the purpose of placing low-risk county inmates in a detention facility operated by the organization.”\textit{Id.}
\item N.M. STAT. ANN. §§ 33-1-10 to 33-3-28 (Supp. 1986).
\item N.M. STAT. ANN. § 33-3-1(B) (Supp. 1986).
\item N.M. STAT. ANN. § 33-1-17(B) (Supp. 1986).
\item N.M. STAT. ANN. § 33-3-9(D) (Supp. 1986). Provides:
\item “If a private independent contractor operates a jail, he shall make reports of ... good behavior to the sheriff ... All action on such reports and awards or forfeitures of good time shall be made by the sheriff.” The independent contractor, however, can make recommendations for such action by virtue of making the reports upon which the action will be based.\textit{Id.}
\item N.M. STAT. ANN. § 33-3-5 (Supp. 1986).
\end{itemize}
proper maintenance of life.”

The Tennessee statute\textsuperscript{142} is better drafted than the Florida, New Mexico, or Texas statutes, defining, for example, key terms such as “correctional services.”\textsuperscript{143} The Tennessee statute also refers to specified standards\textsuperscript{144} or at least lists factors to review\textsuperscript{145} when judging the quality of services in the private prison.

Still, Tennessee’s statute has its shortcomings. The statute fails to clarify what is meant by such terms as indirect costs.\textsuperscript{146} Considering the importance of cost considerations under the statute,\textsuperscript{147} clarity would seem to be paramount in this area. Moreover, the Tennessee statute exempts private prisons from certain requirements imposed on state-run institutions.\textsuperscript{148} The failure to hold private prisons to the same requirements imposed on their public counterparts in areas such as the competency\textsuperscript{149} and duties\textsuperscript{150} of correctional employees is unwise in light of the potential for abuse in this area.\textsuperscript{151}

Finally, the Florida statute\textsuperscript{152} allows the Department of Corrections to enter into contracts with private parties to operate correctional facilities.\textsuperscript{153} Like the Texas statute, the Florida statute does

\begin{itemize}
  \item \textsuperscript{141} N.M. Stat. Ann. § 33-3-6 (Supp. 1986). “[I]ndependent contractors of each county in the state shall supply . . . food [to] the prisoners in their jails . . . .” \textit{Id.}
  \item \textsuperscript{142} Tenn. Code Ann. §§ 41-24-1-101 to 41-24-115 (Supp. 1986).
  \item \textsuperscript{143} Tenn. Code Ann. § 41-24-102(2)(A)-(F) (Supp. 1986).
  \item \textsuperscript{144} Tenn. Code Ann. § 41-24-106(2) (Supp. 1986).
  \item \textsuperscript{145} Tenn. Code Ann. § 41-24-105(e) (Supp. 1986).
  \item \textsuperscript{146} “The fiscal review committee shall compare the full costs of the contractor with the state’s full costs of operating similar facilities . . . . [T]he committee shall consider all relevant costs of operation, including direct and indirect costs which should be allocated or assigned to the operations.” Tenn. Code Ann. § 41-24-105(f) (Supp. 1986); \textit{see supra} notes 41-43 and accompanying text.
  \item \textsuperscript{147} Tenn. Code Ann. § 41-24-104 (Supp. 1986).
  \item \textsuperscript{148} Tenn. Code Ann. § 41-24-111(3) (Supp. 1986). Provides: “A prison contractor . . . shall not be bound by provisions of law . . . except as required to comply with the constitution of Tennessee.” \textit{Id.}
  \item \textsuperscript{149} Tenn. Code Ann. § 41-1-103 (1982) (corrections personnel are required to take an oath not to accept a bribe or “ill treat or abuse any convict under [their] care,” a violation of which is perjury); Tenn. Code Ann. § 41-1-116 (1982) (listing qualifications for corrections officers, including physical exams and moral character determination); Tenn. Code Ann. § 41-1-102 (1982) (requiring the commissioner of corrections to appoint a “competent professional staff of employees” and giving the commissioner authority over them).
  \item \textsuperscript{150} Tenn. Code Ann. § 41-1-106 (1982)(requiring commissioner to visit the institution at least once a month to determine whether the rules of the prison are being properly observed). New Mexico’s private prison scheme only requires inspection twice a year. N. M. Stat. Ann. § 33-3-4 (Supp. 1986).
  \item \textsuperscript{151} \textit{See supra} notes 117-129 and accompanying text.
\end{itemize}
not state that those standards which are binding on the state and county, such as the number of prisoners housed and the conditions therein, are applicable to the private contractors. Instead, the Department of Corrections is delegated the broad power to promulgate rules governing private contracting.

Thus, the Tennessee statute, by conferring broad power on a body with private interests and motives, and the Texas, Florida and New Mexico statutes, by delegating authority without clear standards, do not lessen the fear of over-broad discretion manifested in the Court's decisions in \textit{Panama} and \textit{Schechter}.

\section*{C. No Policy Decision by Legislature}

Justice Rehnquist's concurring opinion in \textit{American Petroleum} stressed the idea that a delegation should be struck down when the basic policy decision had not first been made by the legislature. According to Rehnquist, without this requirement, political accountability would crumble. Since prison privatization is a major policy decision, not only in terms of correctional policy, but also with regard to the role of government in society, there might be grounds for striking down Federal delegation under the \textit{American Petroleum} and \textit{Chadha} rationales if Congress fails to specifically address this question.

The former Director of the Federal Bureau of Prisons, Norman A. Carlsons, has stated that the federal government already has the statutory authority it would need to contract out management of an entire prison. The basis of this assertion is 18 U.S.C. section 4082(b) which states that "[t]he Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise . . . ." A close examination of this statute and its subsequent history indicates that this argument is not well founded.

First, as of November 1, 1986, 18 U.S.C. section 4082(b) has been amended. Second, in most cases, the purpose of the clause

\begin{itemize}
\item 154. \textit{FLA. STAT. ANN.} § 951.23(2)(b) (West 1985).
\item 156. \textit{448 U.S. 607, 671 (1980)} (Rehnquist, J., concurring).
\item 157. \textit{Id.} at 687.
\item 158. \textit{17 CRIM. JUSTICE NEWSL., Jan. 2, 1986 at} 5. The federal government is the largest contractor for private prisons, mostly for INS detention centers. Krajick, \textit{supra} note 8, at 2.
\end{itemize}
"whether maintained by the Federal Government or otherwise," is to allow those individuals convicted of federal crimes to be housed in state institutions.\(^1\) Third, because of the date the statute was passed and the limited role of private contracting under it (i.e., community treatment centers),\(^2\) it would be unfair to assume that Congress intended the statute to serve as authority for prison privatization.

Until Congress codifies a definite policy decision to accept prison privatization on the federal level, such a delegation should not be constitutional.

IV. NONDELEGATION AS A MATTER OF POLICY

Even those commentators who reject the present utility of the nondelegation doctrine nevertheless admit that a delegation of power may be invalidated if the hazards of such a delegation outweigh the advantages.\(^3\) Such an inquiry suggests an examination of societal policy values whose strength might prevent an otherwise valid delegation.

Apart from any possible legal constraints on the privatization of prisons, there are a few major policy reasons why such a shift would be unwise.

A. Government Responsibility

Prison privatization represents the government's abdication of one of its most basic responsibilities to its people.\(^4\) Under the Constitution, the government is to provide for the "general Welfare of the United States."\(^5\) Even if the government's only duty is to assure that basic services are provided — not necessarily by the government\(^6\) — privatization can be viewed as a move by the government to detach itself from this responsibility\(^7\) for the sake of private values, including the profit motive.\(^8\)

\(^1\) Brede v. Powers, 263 U.S. 4, 10 (1923).
\(^3\) F. Cooper, I State Administrative Law 53 (1965).
\(^5\) U.S. CONST. art. I, § 8, cl. 1.
\(^6\) Tolchin, supra note 39, at 26, col. 3.
\(^7\) Mahaffey, supra note 2, at 1341.
\(^8\) The Big Sellout, THE NATION, Jan. 11, 1986, at 3, 4.
The construction and operation of a prison has traditionally been a government responsibility and an indispensable part of the administration of the criminal law. Corrections is not separate from the criminal law; rather, it is a component of an integrated criminal justice system. Just as the state is responsible for promulgating the criminal code, it also has a responsibility to see that the laws are enforced and its offenders are punished. Transferring the provision of corrections to the private sector is tantamount to transferring an important element of government responsibility.

Not only is corrections one of the government's most basic responsibilities, it is probably the most sobering. The ability to deprive citizens of their freedom, force them to live behind bars and totally regulate their lives, is unlike any other power the government has. The responsibility for corrections goes beyond issues of cost efficiency and touches on whether a private company should be able to regulate the affairs of a citizen deprived of his freedom.

Government will be held responsible for what goes on inside the private prisons with which it contracts. Without direct management and supervision of these institutions, the government will have little control of its own system. To insure direct government control, corrections should not be delegated to the private sector.

B. Violation of Democratic Process

Privatization of prisons abridges the democratic process in a number of ways, most notably, with respect to prison construction. As discussed earlier, traditional prison construction depends upon approval of the voters in a referendum on a prior bond issue. Without approval of the voters, plans for construction will be defeated.

170. 60 AM. JUR. 2D Penal and Correctional Institutions, § 3 (1972); see supra notes 82-83 and accompanying text.
171. Harrison & Gosse, supra note 111, at 191.
172. Id. Cf. Hearings, supra note 8, at 479.
175. Vise, supra note 96, at Fl, col. 1.
176. See supra note 8.
Although some have seen it as a hindrance to the system, voter approval is a necessary measure to insure prudent governmental decision making.\textsuperscript{177} With the introduction of private financing, however, the will of the people can be totally ignored. Since voter approval is not required and debt ceilings are circumvented,\textsuperscript{178} a government entity can contract with a private prison company and force its citizens to pay for the prison through their tax share even if the voters oppose such a move.\textsuperscript{179} Indeed, private prisons have already encountered strong public opposition as a result of this cost factor.\textsuperscript{180}

Additionally, privatization lessens the impact both the voters and the government will have on correctional policy. While the public has a right to see information, such as a prison’s budget, there is no guarantee that it will be able to do so once the prison is run by a private company.\textsuperscript{181} Also, since private contractors are not elected officials, they are not subject to community pressure which might spur them to correct possible problems.\textsuperscript{182} Likewise, while the government now oversees corrections via its ability to hire and fire the executives running the prison system, the operators of a private prison are only held accountable to their employer, the private company.\textsuperscript{183}

\textbf{C. Discourages Alternatives to Incarceration}

Privatization would increase the government’s ability to build more prisons and jails and thus incarcerate more people.\textsuperscript{184} The question still remains whether more prisons will solve the overcrowding problem. Some argue that the problems that face the corrections system, such as overcrowding, are not due to increases in crime rates, but rather, result from decreases in the use of alternatives to incarceration, increases in mandatory sentencing, and harsher penalties.\textsuperscript{185} Others point out that prisons are a “capacity driven” government function — in other words, they fill up as quickly as they are

\begin{itemize}
  \item \textsuperscript{177} Privatization of Prisons and Jails: Hearings Before the House Judiciary Sub-Comm. on Courts, Civil Liberties and the Administration of Justice, 99th Cong., 1st Sess. 10 (1985)[hereinafter Koren](statement of Edward I. Koren, ACLU Staff Attorney)(on file at Hofstra Law Review).
  \item \textsuperscript{178} Mullen, supra note 8, at 3.
  \item \textsuperscript{179} Rosenberg, supra note 8, at 1.
  \item \textsuperscript{180} Foltz, supra note 30, at 80.
  \item \textsuperscript{181} Report on a Study of Issues, supra note 31, at 31.
  \item \textsuperscript{182} National Sheriffs', supra note 112, at 4.
  \item \textsuperscript{183} See Coughlin, supra note 113.
  \item \textsuperscript{184} Taylor, supra note 113, at A15, col. 1.
  \item \textsuperscript{185} A. Aiyetoro, supra note 8, at 4.
\end{itemize}
MAKING PRISONS PRIVATE

built. Under this theory, building more prisons, either public or private, would only perpetuate the problem since the government cannot outbuild the number of people it incarcerates. On the other hand, alternatives to incarceration are far less expensive to implement than the construction and management of prisons and jails. Moreover, less than half of the incarcerated population is considered violent. Therefore, other means of dealing with offenders aside from incarceration would seem to be appropriate.

Private companies, which have a vested interest in keeping their prisons full in order to maximize profits, will likely discourage alternatives such as increased parole, probation, and community based programs. In addition, in order to protect their investment, they will likely lobby for longer sentences and reduced use of probation and parole. Therefore, while keeping the prisons filled is clearly in the best interests of the prison-for-profit companies, one must ask whether it is in the public's best interest.

D. Harder to Monitor

When the government transfers correction facilities to the private sector, it will have greater difficulty in monitoring what actually goes on inside. To make sure its policies are being implemented and to protect the constitutional rights of the inmates incarcerated there, supervisors and "watchdogs" will have to be sent to observe what goes on. Even in the extensive prison privatization statute passed in New Mexico, however, mandatory inspectors are only required twice a year. In the Chattanooga, Tennessee jail, only one county official (who is not always present) is assigned to oversee the jail.

187. A study conducted in 1980 found that on the average, newly constructed prisons became overcrowded within five years. A. Aiyetoro, supra note 8, at 4-5.
188. Id. at 13.
189. Id.
190. Travis, Latessa & Vito, supra note 164, at 14.
191. See Koren, supra note 177, at 3. Those who view retribution as the primary purpose of corrections would also favor longer sentences and less use of probation or parole if they felt the crime necessitated it. See, e.g., A. Von Hirsch, Doing Justice: The Choice of Punishments 66-76 (1978).
192. A. Aiyetoro, supra note 8, at 14-15; Mullen, supra note 8, at 5.
194. N.M. STAT. ANN. § 33-3-4 (Supp. 1986). Additionally, the "inspectors" are not professionally trained, but are equivalent to those grand juries which still inspect jails in some states. See National Sheriffs', supra note 112, at 3.
With this kind of spotty government oversight, and considering the fact that these correctional officers are given broad discretion in performing their duties,\textsuperscript{196} monitoring private prisons will prove much more difficult. Specifically, quasi-judicial functions, such as the disciplining of inmates for institutional infractions, the use of deadly force, and the ability to make recommendations to parole boards, are predicted to become difficult to oversee.\textsuperscript{197}

Proponents of privatization argue that their contracts will provide for improved services and a better environment for inmates.\textsuperscript{198} To help achieve this goal, they claim that their contracts will seek and maintain accreditation with the Commission on Accreditation.\textsuperscript{199} These standards, however, have been severely criticized by those in the field and may, therefore, fail to guarantee adequate conditions of confinement even if they are met.\textsuperscript{200}

Studies in the area of privatization generally,\textsuperscript{201} and of private prisons specifically,\textsuperscript{202} have shown that difficulty in monitoring the contract is one of the biggest problems. Additionally, even if private prisons are highly regulated by statute, the same scandals and abusive conditions found in the private nursing home industry (which is also governed by mandatory standards and inspectors) may occur in private prisons.\textsuperscript{203}

While most contracts with private companies will allow for termination if the company fails to meet the standards set forth,\textsuperscript{204} invoking these clauses may not be easy. In a situation where the government contracts out its entire corrections system to a private company, the government will no longer be in a strong bargaining position.\textsuperscript{205} It will more likely pay higher fees and ignore potential problems rather than cancel the contract and be left without anyone

\textsuperscript{196} Id.
\textsuperscript{197} Robbins, supra note 28, at 326-27.
\textsuperscript{198} Koren, supra note 177, at 7.
\textsuperscript{199} Id.
\textsuperscript{200} Id. State institutions are judged by the same standards and they are under court order in at least 32 states to remedy unconstitutional conditions of confinement. Krajick, Prisons for Profit, supra note 18, at 14.
\textsuperscript{201} H. Hatry, A Review of Private Approaches for the Delivery of Public Services 16-17 (1983).
\textsuperscript{203} Borna, supra note 18, at 322; Krajick, Prisons for Profit, supra note 18, at 14; Krajick, Punishment for Profit, supra note 18, at 27.
\textsuperscript{204} See, e.g., N.M. STAT. ANN. § 33-1-17(A)(4) (Supp. 1986).
\textsuperscript{205} Report on a Study of Issues, supra note 31, at 33.
to manage its correctional institutions.²⁰⁸

E. Equity

The final argument against prison privatization is probably the hardest to resolve. It has been called the "symbolic question"²⁰⁷ and deals more with philosophical than legal issues. Basically, it asks whether it is fair or equitable to transfer the provision of corrections into private hands.

Unlike other areas of privatization, the administration of justice is an important element here. Since justice is a condition, not a service, there is a significant distinction between private prisons and private garbage collection.²⁰⁸ In no other area but in the operation of correctional institutions does the ability of complete control exist.²⁰⁹ Will private prisons be able to meet the requirements of fairness and impartiality required on the part of those who function in quasi-judicial capacities²¹⁰ and insure that they will not abuse their power of complete control?

The government, not private companies, is allowed to exercise such power because of the concepts of the social contract and the legitimacy of government.²¹¹ Under our system, we agree to accept the laws of society and the power of the state to enforce these laws. When we violate these laws, we agree to let the state punish us. We accept such an arrangement because, like a covenant, it has benefits and burdens. We accept the law because while it punishes us, it also protects us. Yet our acceptance of the law will only continue if it is made and enforced by a separate body known as the State through its authorized agents. Once laws are made or sought to be enforced by those other than the accepted entity of the State (i.e., private interests), the social contract has been violated.

The conclusion is that only the government should have the power to limit people's freedom.²¹² Power should remain with the

²⁰⁷ Robbins, supra note 28, at 331.
²⁰⁹ Woolley, supra note 25, at 310.
government as "a matter of symbolism." As the Court stated in *Offutt v. United States*, "justice must satisfy the appearance of justice."

Finally, is it fair to let private industry profit from the administration of justice and allow prisons to be run on the competitive market? Even if private claims of efficiency are true, this does not mean that justice will be served. Perhaps corrections would be best served if it were to remain an exclusive government function. As Michael Walzer has stated, "[s]o long as we send men and women to prison, we have to pay attention to what happens to them once they are there. It may be a sad truth, but it is a truth nonetheless: in a democracy, the prisons belong to the people."

**Conclusion**

This Note has argued that the recent trend of privatization in the area of corrections is a violation of the nondelegation doctrine. The doctrine was created to insure that legislative power and policy decisions are not delegated without proper safeguards. While the modern trend is clearly in favor of broad delegations of power, there is a point where, because of the nature of the power involved, the nondelegation doctrine would once again apply. For reasons of potential abuse, equity, and political accountability, the doctrine should apply to the privatization of prisons.

Even, if the position that this Note sets forth is accepted, the larger problems of overcrowding and cost will still remain unresolved. Greater use of alternatives to incarceration, such as community treatment, halfway houses, and restitution programs should be pursued and applied with more vigor. Such alternatives would somewhat alleviate the problem. It has not been the purpose of this Note, however, to examine in detail what can be done to improve the

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213. Robbins, supra note 28, at 331. See Starr, *The Limits of Privatization*, in PROSPECTS FOR PRIVATIZATION 124, 135 (S. Hanke ed. 1987). Privatization must be seen not only as a technical instrument of policy, but also as a political measure of symbolic consequence. When applied to the administration of justice and exercise of coercive power, the symbolic element is of paramount importance. Meting out justice is a communicative act, its public character ought not to be confused. Where the State represents the nation and seeks to speak with one voice, it needs public servants loyal to its highest interests, not private contractors maximizing their own.


correction system. Rather, this Note has argued that before anything can be done, we must first accept responsibility for our correctional system, including its operation. Reawakening the "sleeping giant" of the nondelegation doctrine for this situation would insure that such responsibility remains with an accountable government and is not cast off to autonomous third parties.

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